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No 88-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JULIUS TRUMP, *et al.*,

Petitioners,

v.

BERTRAM FIELD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PRELIMINARY STATEMENT

Respondent contends that this Court should let stand a situation where a tender offeror's literal compliance with the safe harbor provisions of SEC Rule 14d-2(b) would legally and retroactively terminate a planned tender offer everywhere in the United States except within the Second Circuit, which court would require, in addition, that the offeror "genuinely intends to abandon the goal" of acquiring the target company. Having for the first time to defend the decision of the Court of Appeals — a decision as unprecedented as it was unexpected based upon the arguments presented to that court — Respondent is forced to rely upon a decision never even cited at any prior time in this proceeding by either court or counsel and an allegation never made in the complaint, *i.e.*, that the public announcements at issue "do not comply with Rule 14d-2(b)." Res. Br. at 9.

As set forth in the Petition, SEC Rule 14d-2(b) treats a public announcement of an intent to begin a tender offer in the future, followed within five business days by a public announcement of a determination not to begin such an offer, as a nullity; *i.e.*, if both announcements are made and contain the proscribed information, the legal effect is that no tender offer was commenced as a result of the initial announcement. Indeed, but for Rule 14d-2(b), the announcement of a present intent to commence a future tender offer would not, alone, constitute the making of a tender offer. Despite the fact that there is no allegation in the complaint that Petitioners' public announcements did not contain the information required by the Rule or were untimely, the Court of Appeals nevertheless applied Rule 14d-2(b) to find a tender offer had begun, but judicially disregarded the safe harbor provisions of the Rule in order to find a violation.

The Second Circuit held that Section 14(d)(7) — the "best-price rule" — would apply from the first public announcement, regardless of whether Petitioners complied with the letter of Rule 14d-2(b). It concluded that in order for Petitioners or any other bidder to obtain the safe harbor provided by the Rule — that no tender offer had been commenced — Petitioners must not only make the second public announcement required by the Rule but, at the same time, must also demonstrate they "genuinely intend[ ] to abandon the goal of the original offer, (A-11)," *i.e.*, acquisition of the target company.

As set forth in the Petition, this holding: (1) conflicts in principle with authority in other circuits and is contrary to this Court's reasoning in *Schrieber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985); (2) conflicts with the policy and purpose of Rule 14d-2(b); (3) conflicts with the SEC's own construction of the Rule; (4) conflicts with the SEC's own view that private purchases subsequent to withdrawals of tender offers are not unlawful; (5) conflicts with prior Second Circuit authority to the same effect; and (6) introduces uncertainty into the securities laws, a result repeatedly avoided by this Court and other federal courts.

Respondent never addresses these issues except in conclusory terms. Instead, Respondent tries to justify the Second Circuit's holding based on a single sentence of *dicta* in a single case, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). The fact that another case in the same circuit purportedly supports the instant erroneous decision is utterly irrelevant to the issue of whether *certiorari* should be granted. Respondent also argues that because this appeal is interlocutory the Court should decline to grant *certiorari* — despite the fact that it was an appeal from a final order and despite the fact that this Court has exercised discretion and granted *certiorari* in many recent cases which came to the Court in the same procedural posture as this case. Indeed, Respondent's lack of support for the Second Circuit's holding demonstrates how erroneous it was and the potential for unpredictable results and departures from settled law which application of that decision will bring. *Certiorari* should be granted.

ARGUMENT

Respondent's Brief in Opposition confirms that the central issue involved in this petition is the question whether the announcement of an intent to commence a tender offer at $22.50 ("the September 7 Announcement"), followed by an announcement, within 5 business days, of a determination not to commence such an offer (the "September 12 Announcement") nevertheless may result in a tender offer. There is no allegation in the complaint or elsewhere that these announcements constituted an "unorthodox" or "unconventional" tender offer under the *Wellman* test.[1] Nor is there any allegation that these announcements constituted commencement of a formal tender offer pursuant to Rule 14d-2(a). Thus, it is only Rule 14d-2(b) which can transform these public announcements into the commencement of a tender offer, and under that Rule no tender offer was commenced. As explained in the Petition, however, the Second Circuit ignored the words and policy of Rule 14d-2(b) and held incorrectly that a tender offer did result.

Rule 14d-2(b) determines the legal effect of the September 7 Announcement. The Rule provides the announcement "shall be deemed to constitute the commencement of a tender offer." Thus, the Rule itself creates a "tender offer" even though no formal offer has begun. The Rule however provides a safe harbor exception: "Except, that such tender offer shall not be deemed to be [commenced] if within five business days of such public announcement, *the bidder . . . [m]akes a subsequent announcement stating that the bidder has determined not to continue with such tender*

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[1] This refers to the eight factor test announced in *Wellman v. Dickinson*, 475 F. Supp. 783, 817-18 (S.D.N.Y. 1979), *aff'd* 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). *See also* Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1276-77 (1973).

offer."[2] Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (emphasis added). In essence, the subsequent public announcement cancels the legal fiction that a tender offer has been commenced. Here, on September 12, 1985, within five business days, the Trumps — the bidder — announced that no tender offer at $22.50 would be made. Despite Respondent's claim to the contrary, Res. Br. at 9, there is no allegation in the complaint that the September 12 Announcement did not comply with Rule 14d-2(b).

Literal compliance with the Rule should have ended judicial scrutiny. The SEC intended to "provide[ ] certainty to bidders" as to when a tender offer began and ended, thereby "preventing the imposition of *undue burdens* on a bidder. . . ." Exchange Act Release No. 16,384 [1979-80 Transfer Binder] Fed Sec. L. Rep. (CCH) ¶ 82,373 at 82,583 (Nov. 29, 1979) (emphasis added). The SEC recently affirmed that Rule 14d-2(b) only requires literal compliance and that a court must accept at face value an announcement that commences a tender offer according to the terms of Rule 14d-2(b). As the SEC explained, in an *amicus curiae* brief in *American Carriers, Inc. v. Baytree Investers, Inc.*, No. 88-1533 (10th Cir.) [Appeal dismissed per stipulation, Dec. 2, 1988], any test other than literal compliance would not "make sense. If the rule were only triggered when it has first been determined by independent judicial tests that an offer has commenced, there would be no need for a rule. . . ." SEC

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[2] Rule 14d-2(b) does not deal with intent. Thus, Respondent's claim that Rule 14d-2(b) provides a "tender offer shall not be deemed to have commenced where the bidder '*has determined* not to continue with such tender offer'" misleadingly quotes only part of the Rule. Res. Br. at 9. (emphasis added). The Rule only requires that a bidder makes a *public announcement* to that that effect. Of course, if the announcement is false, the anti-fraud provisions of the Act, e.g., § 10(b), would apply. Here, the Court of Appeals has found that Petitioners fully disclosed all material information (A13-18).

Brief at 13. Clearly here also, the SEC's purpose of certainty is disserved if the effectiveness of a withdrawal depends upon later judicial scrutiny.[3]

Despite Petitioners' compliance with the plain text of Rule 14d-2(b), the Second Circuit nevertheless created a wholly unnecessary[4] and legally incorrect judicial gloss[5] on the Rule by holding the announcement of an intent not to continue an offer is not "effective" unless the tender offeror "genuinely intends to abandon the goal of the original offer," (A-11) *i.e.*, acquisition of the target company.[6]

Petitioners' literal compliance with Rule 14d-2(b) also satisfied the policies behind the Rule. The SEC designed the Rule to prevent bidders from publicly announcing the material terms of a cash tender offer while postponing making full disclosure, thus leaving shareholders to make investment decisions on the basis of incomplete information. Exchange Act

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[3] An agency's interpretation of its own rules is, of course, entitled to substantial deference. *Train, Inc. v. N.R.D.C.*, 421 U.S. 60, 75, 87 (1975).

[4] There was no need to extend the protection of Section 14(d)(7) because the problems mentioned by the Second Circuit would have been covered by other provisions of the securities laws. *See* Petition for a Writ of Certiorari, 15-16.

[5] The gloss adopted by the Second Circuit was totally spontaneous. Respondent never alleged that Petitioners failed to comply with the requirements of Rule 14d-2(b). Moreover, Respondent did not even make the argument that 14(d)(7) was dispositive. Instead Respondent argued to the Court of Appeals that because Section 14(d)(7) could be evaded — an admission the section was not applicable — Rule 10b-13 was the "single most important issue on this appeal." Res. Brief in the Second Circuit at 34, 1. The Second Circuit rejected the Rule 10b-13 claim in a footnote.

[6] Respondent's argument that the test of an effective withdrawal pronounced by the Court of Appeals is objective rather than subjective is ludicrous. The Second Circuit's own language, that a withdrawal is effective when the offeror "genuinely intends to abandon the goal of the original offer," 850 F.2d at 945, clearly forecloses that argument. As a general principle, words like "honestly intend" or "genuinely intend" denote a subjective inquiry. *Cf. Laffey v. Northwest Airlines, Inc.*, 740 F. 2d 1071, 1098 n.43 (D.D.C. 1984), *cert. denied*, 469 U.S. 1181 (1985) (test whether employers "honestly intend" to act in accordance with Equal Pay Act was subjective).

Release No. 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,228 (Feb. 5, 1979). Rule 14d-2(b), promulgated pursuant to Section 14(e) of the Williams Act, is consistent with the policy of full disclosure reaffirmed by this Court in *Schreiber v. Burlington Northern Inc.*, 472 U.S. 1, 12 (1985); *see also* Petition, at 16-19. That purpose was satisfied here. The Court of Appeals found Petitioners fully disclosed all material information. A13-18. Respondent concedes there was full disclosure, that "Petitioners clearly stated what they would do . . . [a]nd they did it," and "[t]he circumstances [of the withdrawal] required little interpretation, because they were not hidden." Res. Br. at 5, 16. Although Respondent avoids any mention of *Schrieber*, its vitality is unquestioned.[7]

It is also undisputed that this withdrawal was followed by the formal commencement of a tender offer at $23.50 — a $1 premium over the inchoate $22.50 plan. Again this was in complete accord with the SEC's purpose in adopting Rule 14d-2(b). Indeed, the SEC designed Rule 14d-2(b) to permit cancellation of the announced offer in order to "allow a bidder to consult with the subject company and to make an evaluation of the probability of success of a 'friendly' acquisition which might further benefit investors." Exchange Act Release No. 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,228 (Feb. 5, 1979). Here the withdrawal pursuant to Rule 14d-2(b) allowed the bidder to do just that and worked to bring an extra dollar per share of further benefit to shareholders.

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[7] Since the filing of the Petition for Certiorari, the *Schrieber* principles were followed by the Third Circuit. In *Polaroid Corp. v. Disney*, No. 88-3676 (3d Cir. Nov. 23, 1988), the court was faced with a challenge to Rule 14d-10, the "All-Holders Rule," adopted — as Rule 14d-2 was — under Section 14(e) of the Williams Act. The *Polaroid* court anchored its analysis of Section 14(e) to this Court's decision in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), and observed that: "*Schreiber characterizes even . . . section 14(d)(7) . . . as "requir[ing] or prohibit[ing] certain acts so that investors will possess additional time within which to take advantage of the disclosed information.*" Slip op. at 13 (emphasis added).

Both Respondent and the Second Circuit ignore the current law that purchases after withdrawal of an offer are *not* integrated with the offer. The SEC proposed — but did not adopt — two rules, Rule 14d-8 and Rule 14d-11, both of which would have integrated purchases after withdrawal of a tender offer. *See* Petition for a Writ of Certiorari at 14. Either proposed rule would have treated the problem of withdrawals followed by purchases — the events at issue here — as a single offer. If purchases after withdrawals were currently unlawful, according to the Second Circuit, in another context, the SEC "would scarcely have proposed [these rules]." *Fogel v. Chestnutt*, 533 F.2d 731, 752 n.25 (2d Cir. 1978), *cert. denied*, 429 U.S. 824 (1976). Here according to Rule 14d-2(b), there was no prior tender offer. And yet the Second Circuit has made unlawful actions which the SEC does not consider unlawful. Respondent has failed to address this fundamental inconsistency in the Second Circuit's holdings.

Instead of discussing these issues, Respondent urges this Court to deny *certiorari* because of this Court's "custom" of denying *certiorari* in connection with "interlocutory orders," Res. Br. at 11, and because a single prior decision in the same circuit purportedly supports the instant erroneous decision, Res. Br. at 4-5. Neither claim is a valid ground to deny *certiorari*.

First, the Second Circuit decision here was an appeal from a *final* judgment — a dismissal under Fed. R. Civ. P. 12(b)(6) — not from an interlocutory order. It is also equally clear that this Court may grant *certiorari* to review interlocutory decisions[8] and procedural rulings.[9] Recent history dem-

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[8] 28 U.S.C. § 1292(b) provides for interlocutory appeals from the district courts to the courts of appeals, in their joint discretion. Judgments in cases accepted by the court of appeals under § 1292(b) are, in turn, reviewable by the Supreme Court under § 1254. *Fortnightly Corp. v. United Artists Television, Inc.*, 389 U.S. 969 (1967).

[9] *International Union, United Automobile Workers v. Scarfield*, 382 U.S. 205 (1965), (order denying intervention on review of NLRB order); *American Power and Light Co. v. SEC*, 325 U.S. 385 (1945) (order denying motions to dismiss review of SEC order).

onstrates this Court's practice of granting *certiorari* to a circuit court reversing, in full or in part, a dismissal — as presented here — pursuant to Rule 12(b)(6). *See, e.g., Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Alexander v. Choate*, 469 U.S. 287 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

Second, Respondent's reliance on *Missouri Portland Cement Co. v. Cargill, Inc.*, 495 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) — a case previously cited nowhere by either the parties or the courts below — is entirely misplaced. The fact that another case in the same circuit purportedly supports the instant erroneous decision is utterly irrelevant to the appropriateness of a grant of certiorari. In any event, *Cargill* is irrelevant. *Cargill* merely indicates, in *dicta* and in the context of non-disclosure claims, that Section 14(d)(7) might apply to two offers where the first offer's expiration is followed by commencement of a new offer. *Cargill, supra*, 498 F.2d at 874.[10] Here, Rule 14d-2(b), adopted subsequent to *Cargill*, makes clear there was no tender offer at $22.50 as a result of the two public announcements. Moreover, here there is no valid claim of nondisclosure. Finally, the SEC, in proposing Rule 14d-8, has indicated its belief that Section 14(d)(7) would not reach the situation in *Cargill*, that is, where a "bidder may within a short time after the first tender offer [has expired] make a second tender offer for securities of the same class for different consideration which may be higher than that offered in the first tender offer." Exchange Act Release 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,230. Thus, *Cargill* has no bearing on the question of whether a grant of *certiorari* is appropriate.

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[10] In fact, the authority cited by the *Cargill* court, Aranow & Einhorn, Tender Offers for Corporate Control (1973), p. 135-37, makes clear that two different tender offers are required as a basis for integration.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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